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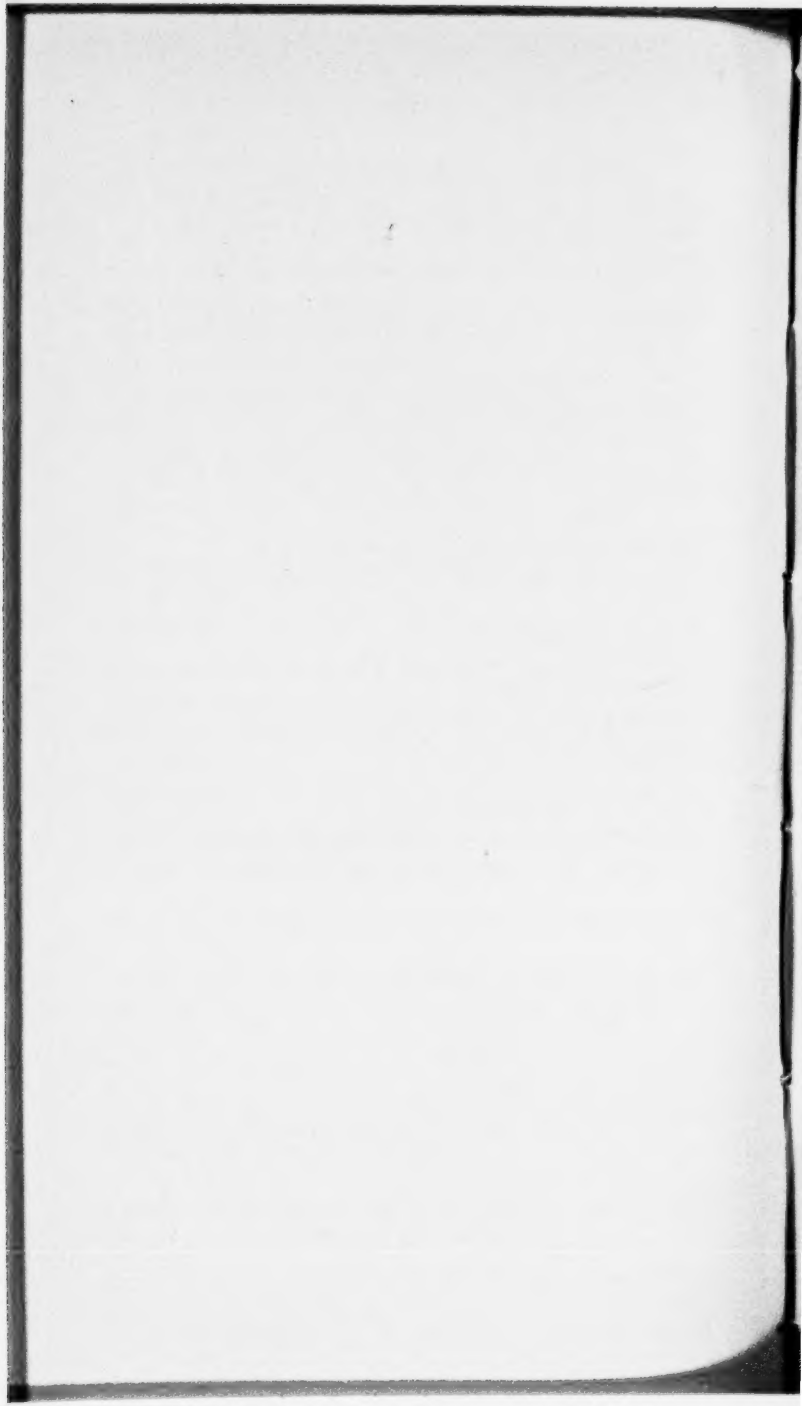
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Supreme Court of the United States,

OCTOBER TERM, 1914.

No. 8.

JAMES SIM,
Petitioner,

vs.

WILLIAM EDENBORN,
Respondent.

On Writ of Certiorari to the United States Circuit Court of Appeals for the Second Circuit.

STATEMENT OF THE CASE.

This writ was granted to review a judgment of the United States Circuit Court of Appeals for the Second Circuit, reversing a judgment of the United States District Court for the Eastern District of New York in favor of plaintiff, entered upon the report of a Referee appointed under a written stipulation waiving a jury trial (pp. 113-4, fols. 338-402).

The action was founded upon a prior rescission for fraud to recover moneys paid by plaintiff, and three others, whose claims were assigned to plaintiff.

The action was originally brought in the State Court, but removed by defendant to the Circuit Court of the United States for the Eastern District

of New York, on the ground of diversity of citizenship (p. 24, fols. 70-72).

The causes of action were similar in their allegations, to wit: defendant in April, 1902, being the owner of 5,365 out of 9,254 shares of the United States Iron Company, prepared a syndicate agreement which expresses, as its prime object, that an opportunity is afforded to acquire for a cash consideration the ownership, control and possession of the United States Iron Company, at par, and for the consolidation of the United States Iron Company and other iron ore properties, and for other purposes, *appointing himself syndicate manager and agent and attorney of the subscribers,* to which agreement he invited subscriptions amounting to $2,500,000. Among those invited were plaintiff and his associates (p. 5, fol. 15, p. 116, fols. 347-8), each of whom made a subscription: Sim for $15,000; Cluff for $15,000; Coles for $20,000; Stone for $5,000 (fol. 348) and Alder for $10,000 (Alder record, p. 21, fol. 63, p. 60, fols. 178-9). The subscriptions were paid. Subsequently plaintiff and his assignors discovered defendant's concealment of his ownership in and control of the United States Iron Company; that he was acting as buyer and seller; that he with others did not intend to pay their subscriptions in cash, and had paid them to a large extent in stock of the United States Iron Company, whereupon they elected to rescind their subscriptions and gave notice of rescission offering to restore the stock they had received and demanding return of the money they had paid (p. 9, fol. 27, and p. 117, fol. 352).

The complaint alleged and the Referee found that a relation of trust and confidence existed between defendant and the subscribers, and that it was his duty to make to the subscribers full and complete disclosure of his interest in the United States Iron Company, of his stock holdings therein, and of any

other interest of his in such company, and in the proposed scheme provided for in the syndicate agreement, and to give to said subscribers and each of them as full information as he possessed relating to said subscriptions, and of any fact which would affect their interest or the interest of any or either of them (p. 5, fol. 14).

The complaint in its original form was demurred to for insufficiency, defective parties and improper joinder of causes of action (p. 25, fols. 75-7). This demurrer was sustained with leave to amend. The complaint was amended and a second demurrer was interposed on the same grounds, which was overruled, with leave to defendant to answer. A decision was signed, finding, first, that the complaint states facts sufficient to constitute a cause of action; second, that there is no defect of parties defendant, and, third, *that the complaint states a cause of action at common law based on the rescission of a contract alleged to have been procured by fraud* (p. 59, fol. 177). Judgment was entered overruling the demurrer (p. 60, fol. 180). No attempt was made by defendant to obtain a review of this decision and judgment, and an answer was served (p. 62, fol. 184).

The answer denied the allegations of the complaint, except the allegation that it was "defendant's duty to make to said subscribers full disclosure of all facts and circumstances within his knowledge, and which the subscribers ought to have known in order to enable them to form an independent judgment and to protect their interests (p. 65, fol. 194).

A copy of the syndicate agreement, with a list of subscriptions annexed to the answer, is referred to in the Referee's report as the Syndicate Agreement Exhibit No. 16 (p. 116, fol. 347).

By written stipulation between the parties a jury trial was waived and the issues of law and facts

were referred to a Referee to hear and determine the same (p. 113, fols. 337 to 342)

The Referee, in deciding in favor of the plaintiff, followed a decision of the Court of Appeals of the State of New York in *Hecksher* vs. *Edenborn* (203 N. Y., 210), involving the liability of Edenborn, the defendant in that case as well as in this, upon a cause of action founded upon the same syndicate agreement upon which this action is founded, brought by one of the subscribers thereto, precisely as this action is brought by another subscriber, both actions being founded on a prior rescission for fraud and supported by the same facts, the same judgment being rendered in each.

The Referee's report was filed and application being made to the court below upon notice to the defendant's attorney for the entry of judgment, defendant moved for a new trial, which was denied, and judgment was duly entered for the amount awarded by the Referee (p. 173, fols. 398, 402). The defendant *filed 224 assignments of error* (p. 783, fols. 2359-2548), and thereupon sued out a writ of error to the Circuit Court of Appeals for the Second Circuit (fols. 2-5).

That Court refused to follow the decision of the Court of Appeals of New York in *Hecksher* vs. *Edenborn,* and held upon a point not raised at the trial, nor assigned as error, as follows:

> "The Referee held that he was bound by "the decision of the District Judge fortified "by that of the Court of Appeals in Hecksher "*vs.* Edenborn, 203 N. Y., 210, holding that "the complaint stated a good cause of action "and that the only question before him was "whether fraud, actual or constructive, had "been established by the evidence; upon this "point he found that there was no actual fraud, "but that Edenborn being the agent of each "of the syndicate subscribers was bound to "disclose to each, that he was interested in one "of the properties to be purchased and was, as

"agent, selling his own property to the syn-
"dicate in payment of a part of his subscrip-
"tion. His failure to do this, was held to be
"a constructive fraud. He also found that
"the plaintiffs were not guilty of laches. Upon
"this writ of error, these findings are binding
'upon us and they support the judgment.
"(David Lupton Sons *vs.* Auto Club, 225 U. S.,
"489.) But we are authorized to re-examine
"the question whether the complaint states a
"cause of action. This is a question of law
"arising upon the face of the record and raises
"the question whether the facts found by the
"Referee support the judgment he entered.
"(Andes *vs.* Slauson, 130 U. S., 435.)" * * *

"Where judges have differed as much as
"they have in this case, no conclusion can
"be reached with confidence, but we arrive at
"that of the Appellate Division in Hecksher
"*vs.* Edenborn (131 App. Div., 253), especially
"for the reason expressed by Justice Miller
"at page 266."

Thus, the Circuit Court of Appeals, disregarding the decision of the Court of Appeals of New York, adopted an opinion—not a prevailing opinion—in the Appellate Division, which had been overruled by the New York Court of Appeals, and reversed the judgment.

This Court on plaintiff's petition granted a writ of *certiorari* to review the judgment of the Circuit Court of Appeals.

The facts set forth in the complaint and found by the Referee in his report are, dismissing unnecessary verbiage, as follows:

1. On April 5, 1902, defendant was the owner of 5,365 out of 9,250 shares of the United States Iron Company, and continued to be such until about December 30, 1902, when he transferred them to the Sheffield Coal & Iron Company (p. 116, fol. 346).

2. In 1902 he conceived a scheme to consolidate the United States Iron Company with other properties and, on or about April 5, 1902, prepared what has been named a Syndicate Agreement for the proposed consolidation, and invited subscriptions to them.

3. Among the persons invited, and who became subscribers, were plaintiff and his assignors, who subscribed for 650 shares, relying on said representations and statements (p. 116, fol. 348; p. 751, fol. 2253).

4. By the syndicate agreement defendant was appointed agent and attorney of the plaintiff and his assignors (p. 764, fol. 2292). He was also promoter of the scheme or enterprise provided for in the syndicate agreement (p. 764, fol. 2292). As such agent, attorney and promoter he occupied a relation of trust and confidence toward plaintiff (p. 750, fol. 2248; p. 765, fol. 2293); and undertook to direct and manage the syndicate agreement and act thereunder as the agent and attorney of the subscribers with power to fully and effectively carry out the purposes of the agreement (pp. 748-9, fol. 2245).

5. It was defendant's duty to make full and complete disclosure of his stockholdings and interest in the United States Iron Company and in the proposed scheme set forth in the syndicate agreement, and to give to plaintiff and his assignors as full information as he possessed in relation to said subscription, and of any fact which would affect their interest, or that of either of them (p. 117, fol. 351).

6. Plaintiff and his assignors had no knowledge of defendant's ownership of said shares or of his

possessing any interest in the United States Iron Company, and made their subscriptions in ignorance thereof (p. 117, fol. 350).

7. Defendant failed and omitted to disclose his ownership of stock in the United States Iron Company and that he was possessed of any pecuniary interest in said company (p. 117, fol. 349).

8. At the time defendant subscribed to said syndicate he did not intend to pay his subscription in cash or otherwise than in stock in the United States Iron Company (p. 8, fol. 22).

9. Defendant at no time informed plaintiff and his assignors that it was his intention to pay said subscription in stock and not in cash (p. 8, fol. 24).

10. After the subscriptions by plaintiff and his assignors the name of the United States Iron Company was changed to that of the Sheffield Coal & Iron Co., and its stock increased from $1,000,000. to $2,000,000., and the defendant delivered to plaintiff and his assignors in return for the money they paid to him as their subscriptions, stock of the said company at par, and never delivered anything else for or on account thereof (p. 756, fol. 2268).

11. The Sheffield Coal & Iron Co. proved unprofitable and a failure, has become insolvent, was placed in the hands of a Receiver, and the stock issued to plaintiff and his assignors in payment of their subscriptions has become practically worthless (p. 757, fol. 2271).

The complaint then alleges and the Referee finds the discovery by plaintiff and his assignors of defendant's interest and concealments; their election to rescind; their notice of rescission; their offer to return and defendant's refusal to accept what they had received (p. 118, fols. 352-3); that neither of

them had been guilty of laches or of omission of duty or obligation which they owed to the defendant, and the assignments to plaintiff of the claims of his assignors (p. 118, fol. 353).

As Conclusions of Law the Referee found:

1. It was defendant's duty to make adequate, full and complete disclosure of his ownership of stock in the United States Iron Company and of his interest which he possessed therein and of any fact which affected the interest of the subscribers to the syndicate agreement (p. 117, fol. 351; p. 118, fol. 354).

2. He failed and omitted to make such disclosure, and his failure so to do operated, in law, as a fraud upon plaintiff and his assignors and upon each of them (p. 119, fol. 355), and judgment was ordered for the several amounts due plaintiff and his assignors (p. 119, fols. 356-7).

The Referee's opinion will be found on page 121, *et seq.*

The Circuit Court of Appeals held that the facts found by the Referee support the judgment rendered (p. 862), but that they were authorized to re-examine the question whether the complaint stated a cause of action, as this was a question of law arising upon the face of the record, and raised the question whether the facts found by the Referee supported the judgment he entered. Upon such re-examination, the Court held that it was necessary to a rescission that the defendant should be placed *in statu quo;* that neither through himself, nor through the medium of the purchasing company, could defendant be restored to his original position, and that the right to rescind was lost, "as" says the Court, "it may well happen that because of the peculiar situation of any particular case, no right of rescission exists in favor of one

who has been led by fraud into a complicated agreement which has been fully executed" (p. 863).

The reversal by the Circuit Court of Appeals was upon the single point: "That the complaint did not state a cause of action because the plaintiff and his assignors did not put defendant *in statu quo* by tendering to him all that they had received from him for the money paid to him."

Attention should be directed to the fact that defendant insisted on including in the record a "narrative statement of proceedings before the Referee," commencing on page 135 and ending on page 716, also requests for findings (pp. 717-769) and exceptions (p. 770) which the petitioner contended were not a part of the record, and because no bill of exceptions could be allowed after a written waiver of a jury trial and a trial by consent before a referee selected by the parties, and that the only question open to review is whether the facts found by the Referee support the judgment rendered. No bill of exceptions was signed or sealed by the District Judge, and, although he permitted the narrative statement and said requests and exceptions to be filed, he refused to permit them to be filed as a bill of exceptions settled by the Court (p. 716).

A motion was thereafter made to expunge the same from the record, but the Circuit Court of Appeals refused for the time being in an opinion as follows:

> "This voluminous record has already been "printed, and it may require very careful "scrutiny to determine just what parts of it "are not properly before us. For this reason "it seems wiser to deny the present motion "to strike out parts of it. The questions "presented may be disposed of on the main "argument.
>
> "In making this disposition of the motion,

"we are not to be understood as intimating "any departure from the well-settled prac- "tice announced in decisions of the Supreme "Court and of this Court as to what ques- "tions are open to review on writ of error "from a judgment entered after a hearing "before a referee."

Our position is that at common law the only recognized method of trying issues of fact was by a judge and jury, and if by consent of the parties the trial is had before a judge, without a jury, or before an outsider as referee, the judge or referee, as the case may be, acts as arbitrator between the parties. His rulings admitting or excluding evidence, and his findings of facts, are not acts performed by him in a judicial capacity. They cannot be made the subject of an exception under the statute, nor are they brought up for review by writ of error. The only question brought up by a writ of error in such a case is whether there was any error of law in the judgment of the Court rendered upon the pleadings. This was the situation in the United States courts prior to 1865. A clear and exhaustive statement of the law on this subject will be found in *Campbell* v. *Boyreau* (21 How., 223, at pp. 225 to 227).

By act of Congress, passed March 3, 1865, which has since become Sections 649 and 700 of the United States Revised Statutes, it was enacted that, when the parties, by a stipulation in writing, waived a jury trial and consented to go to trial before a judge without a jury, the findings of the Court upon the facts should have the same effect as the verdict of a jury, and his rulings in the progress of the trial might be reviewed by writ of error. This is now the law in the United States Courts in regard to trials of common law actions, by consent, before a judge without a jury under a written waiver of jury trials. When the trial is before a judge upon an oral stipulation, or before

a referee upon any kind of a stipulation whatever, the statute has no application, but the common law applies; the rulings of the judge or referee upon the trial are not subject to review; a bill of exceptions to them is "irregular and unavailing"; and the rule above expounded in the case of *Campbell* v. *Boyreau, supra,* applies, with a modification by later cases, namely: that when the Referee has made specific findings of fact which are made the findings of the Court and incorporated in the record, the appellate Court will review, on writ of error, the question whether the facts as found by the Referee support the judgment entered by the Court. In no other respect is the rule relaxed. There is no reported case holding that a bill of exceptions may be had; but there is a long line of cases holding the contrary:

David Lupton's Sons Co. v. *Automobile Club* (225 U. S., 489).

Shipman v. *Straitsville Mining Co.* (158 U. S., 356).

Andes v. *Slauson* (130 U. S., 435).

Roberts v. *Benjamin* (124 U. S., 64).

Paine v. *Central Vermont R. R. Co.* (118 U. S., 152, 158).

Bond v. *Dustin* (112 U. S., 604).

Newcomb v. *Wood* (97 U. S., 581).

Steel v. *Lord* (93 Fed., 728).

Hudson River Pulp & Paper Co. v. *Warner* (99 Fed., 187).

Parker v. *Ogdensburgh & L. C. R. Co.* (79 Fed., 817).

U. S. Fidelity & Guaranty Co. v. *Hampton* (134 F., 734).

U. S. v. *Ramsey* (158 Fed., 488).

Rush v. *Newman* (58 Fed., 158).

Shipman v. *Ohio Coal Exchange* (70 Fed., 652).

Assignment of Errors and Specification of Errors Relied On.

1. The Circuit Court of Appeals erred in reversing the judgment herein, inasmuch as proper deference and respect for the decision of the New York Court of Appeals in *Hecksher* vs. *Edenborn* (203 N. Y., 210), should have led the Circuit Court of Appeals to lean toward following the said decision of the New York Court of Appeals.

2. The Circuit Court of Appeals having held that no conclusion can be reached with confidence, erred in reversing the judgment herein, and in refusing to follow said decision of the New York Court of Appeals, accepting that of the Appellate Division of the Supreme Court in *Hecksher* vs. *Edenborn* (131 App. Div., 253), especially for the reasons expressed by Justice Miller at page 266, notwithstanding that said decision of said Appellate Division had been reversed by the New York Court of Appeals and said opinion was a minority opinion overruled by the said Court of Appeals.

3. The Circuit Court of Appeals erred in reversing the judgment upon the ground that the complaint failed to show that the defendant was put *in statu quo* inasmuch as it appears upon the facts stated in the complaint and found by the Referee that defendant was put *in statu quo,* unless his own wrongful acts had so complicated the transaction complained of as to prevent plaintiff and his assignors from doing so.

4. The Circuit Court of Appeals having decided that the findings of the Referee were binding upon it, and support the judgment rendered, erred in reversing the said judgment holding that the complaint failed to state a cause of action because a consideration of the syndicate agreement satisfied it that the defendant could not be restored to his original position.

5. The Circuit Court of Appeals erred in reversing the judgment on the ground that the complaint failed to show that the defendant was put *in statu quo* inasmuch as on the facts stated in the complaint plaintiffs and their assignors did, as far as possible, place him *in statu quo* by tendering to him all that they had received from him.

6. The Circuit Court of Appeals erred in reversing the judgment on the ground that the complaint failed to show that the defendant was put *in statu quo* inasmuch as there was no assignment of error by the defendant (plaintiff in error below), specifying as a ground of error that the defendant was not put *in statu quo*, and the point was not raised at the trial.

7. That the assignments of error set forth in the record on page 781 to 850, inclusive, are a perversion of the rule relating thereto, and insufficient to raise for review the alleged errors upon which the Circuit Court of Appeals reversed the judgment herein.

8. The Court erred in reversing the judgment herein on the ground that "because of the peculiar situation of any particular case no right of rescission exists in favor of one who has been led by fraud into a complicated agreement which has been fully executed", and "that this is such a case", inasmuch as fraud will, if it is acted upon promptly when discovered, be a ground for rescinding an executed contract.

9. The Court erred in reversing the judgment on the ground that "if the syndicate subscribers have any right of rescission, that right must be worked out through the purchasing company," inasmuch as the wrong and injury complained of was done to syndicate subscribers individually and personally, and was not a wrong and injury to corporate property, which must be redressed through the company.

BRIEF OF THE ARGUMENT.

FIRST: PROPER DEFERENCE AND RESPECT FOR THE DECISION OF THE NEW YORK COURT OF APPEALS IN HECKSHER *v.* EDENBORN (203 N. Y., 210) SHOULD HAVE LED THE CIRCUIT COURT OF APPEALS IN A CASE BALANCED WITH DOUBT, TO LEAN TOWARD FOLLOWING THE DECISION OF THAT COURT. NOT TO DO SO WAS A DISREGARD OF THE RULE OF COMITY RESPECTING DECISIONS OF THE FEDERAL AND STATE COURTS REPEATEDLY ANNOUNCED BY THIS COURT.

Specification of Errors Nos. 1 and 2.

I.—The duty of the Circuit Court of Appeals to lean to agreement with the State Court, as a matter of comity between the Federal and the State Courts, was so plain, has been so often defined, and has received such careful and painstaking consideration by this Court, that it is unnecessary to enter upon an argument on the subject, or do more than refer to the principal authorities.

Messinger v. *Anderson* (225 U. S., 436).

Kuhn vs. *Fairmount Coal Co.* (215 U. S., 349).

Equitable v. *Brown* (213 U. S., 25).

Chicago Seminary vs. *Illinois* (188 U. S., 662, at p. 674).

Bienville Water Supply Co. vs. *Mobile* (186 U. S., 212, at p. 220).

Forsyth vs. *Hammond* (166 U. S., 506).

B. & O. Railroad vs. *Baugh* (149 U. S., 368, at p. 370).

Bucher vs. *Cheshire Railroad Co.* (125 U. S., 555).

Burgess vs. *Seligman* (107 U. S., 20).

II.—The case now presented is the same in every respect, except as to the name of the plaintiff, as the case of *Hecksher* vs. *Edenborn* (203 N. Y., 210).

III.—That action was decided by the Court of Appeals of New York, October 17, 1911 (203 New York, 210). Seven judges unanimously held that the plaintiff was entitled for fraud to rescind his subscription to the syndicate agreement, and recover moneys paid to defendant thereunder, on restoration of what was received. The cause of action, the subject-matter of the action, the facts involved, were precisely the same in that case as in this, the only difference being that the plaintiffs in the respective cases were different subscribers to the syndicate agreement.

IV.—In deciding this case the Referee, Honorable Edward W. Hatch, formerly a Justice of the Appellate Division of the Supreme Court of New York, followed *Hecksher* v. *Edenborn* (203 N. Y., 210) and his opinion will be found in the record at page 121.

V.—The Circuit Court of Appeals for the Second Circuit rejected *Hecksher* v. *Edenborn*, and adopted a decision, and an opinion—not a prevailing opinion—in the Appellate Division (131 App. Div., 253), both of which had been overruled by the New York Court of Appeals. There is, therefore, a direct conflict between the Court of Appeals of New York and the Circuit Court of Appeals. The Court of Appeals of New York held that upon the facts stated in the complaint the plaintiff was entitled to rescind the syndicate subscription, and recover moneys paid thereunder, on restoration of what he had received; the Circuit Court of Appeals held that he was not. The former holds that the rescission was effectual because defendant was a wrongdoer who prepared the syndicate agreement, and so complicated the matter that if plaintiff and his assignors were unable to put him *in statu quo*, he was responsible for it, and it was therefore un-

necessary for them to do so, citing well-considered authorities; the latter holds that although a wrong-doer, who created the complicated scheme, it was necessary to put him *in statu quo,* just as if he were an innocent party who had done nothing to prevent it. The facts alleged in the complaint were exactly the same as those set forth in the Hecksher case. Upon identical facts the Hecksher case holds that there was a cause of action stated, and the Sim and Alder cases hold that there was not.

VI.—The cases were balanced with doubt, and this the Circuit Court of Appeals concedes.

The opinion says:

> "Where Judges have differed as much as "they have in this case, *no conclusion can be "reached with confidence,* but we arrive at that "of the Appellate Division in Hecksher *vs.* "Edenborn (131 App. Div., 253), especially "for the reason expressed by Justice Miller at "page 266."

VII.—In view of the unanimous decision of the seven Judges of the Court of Appeals of the State of New York, the opinion of one of the four Justices of the Appellate Division, and that of the Justice before whom the first trial of *Hecksher* vs. *Edenborn* took place—nine out of twelve holding that the defendant was liable—this want of confidence was well expressed, and should have led the Circuit Court of Appeals to lean toward agreement with the New York Court of Appeals.

VIII.—May we not also urge that the fact that a re-argument has been ordered by this Court presents a case of doubt that calls for an application of the rule of comity, which if not now followed, will cease to be a safeguard and guide.

IX.—The opinion of the Circuit Court of Appeals introduces diversity and lack of uniformity in the Courts, and perplexity and uncertainty as to legal rights. Not only will the Courts be at a loss how to decide but, in the multitude of transactions growing out of syndicate agreements, and where agents, trustees and others occupying fiduciary relations commit constructive frauds, the legal profession will be involved in doubt and uncertainty as to what advice to give in similar transactions. Conflicting adjudications involving conflicting rules of law and attendant uncertainty as to legal rights, is one of the greatest evils in jurisprudence. In the present case, we have a striking instance of radical and pronounced diversity where there should be uniformity.

SECOND: HECKSCHER *v.* EDENBORN (203 N. Y., 210) IS A WELL SUPPORTED ADJUDICATION AGAINST EDENBORN IN AN ACTION INVOLVING THIS VERY SYNDICATE AGREEMENT, THAT THE SYNDICATE SUBSCRIBERS WHO MADE AND PAID THEIR SUBSCRIPTIONS HAVING NO KNOWLEDGE OR INFORMATION OF EDENBORN'S MAJORITY OWNERSHIP IN, AND CONTROL OF, THE UNITED STATES IRON COMPANY, AND THAT HE DID NOT INTEND TO PAY HIS SUBSCRIPTION OF $500,000 IN CASH BUT IN STOCK, AND THAT AS AGENT AND ATTORNEY OF THE SUBSCRIBERS HE WAS ENGAGED IN PURCHASING FROM HIMSELF HIS OWN PROPERTY, ARE ENTITLED TO RECOVER.

Specification of Error No. 2.

I.—That case holds that he occupied a fiduciary relation to the subscribers to said agreement. And the Referee so finds (p. 765, fols. 2292-3).

(1) The opinion of the Court says:

"He did not occupy the position of an ordi-
"nary vendor but he was inviting others to

"confer upon him a fiduciary relationship" (p. 222).

(2) This accords with the universal rule upon that subject.

Dickerman v. *Northern Trust Company* (176 U. S., 181 at p. 203);
Yeiser v. *United States B. & P. Company* (107 Fed., 340);
Brewster v. *Hatch* (122 N. Y., 349).

II.—The burden was upon Edenborn to show that before the plaintiff and his assignors subscribed the Syndicate agreement appointing him their agent to purchase the United States Iron Company, he made a full and fair disclosure of his interest therein.

(1) In the *Heckscher* case, the opinion says:

> "When he (Edenborn) solicited plaintiff's "assignors to become parties to the Syndicate "and appoint him one of their agents under "the circumstances referred to, he must be "held to have represented that he was legally "qualified to discharge the powers which "were being conferred upon him and the ob- "ligation affirmatively rested upon him to "inform them of his interest in the property "which he was securing authority to buy, if "he would hold them to their contract and "avoid the imputation of legal misconduct "which the law fastens on an agent who at- "tempts to serve the interests of both the "principal and himself" (p. 22).

III.—But we need not rely upon rules of law, for the defendant admits in his answer, by not denying the allegation, that

> "It was his duty to make to said sub- "scribers full disclosures of all facts and cir- "cumstances which were within defendant's "knowledge, which said subscribers ought to "have known in order to enable them to form

"an independent judgment and protect their "interests" (fol. 14).

IV.—The Referee finds as a matter of fact as well as a conclusion of law (pp. 117-8, fols. 351-354), that Edenborn's duty was to make full and complete disclosure of his interest in the United States Iron Company, of his stockholding therein and of any other interest which he had in such company and in the proposed scheme provided for in the Syndicate agreement, and to give to the said subscribers and each of them as full information as defendant possessed in relation to said subscriptions, and of any facts which would affect their interests or the interests of any or either of them, and that he failed and omitted to make such disclosure.

(1) In the *Heckscher* case the Court uses this language:

> "The principle that a person occupying a "position of agent to purchase may not sell "his own property to his principal is so ele- "mentary that it need only be stated. It "must be quite as elementary and true that, "if one by misrepresentation or suppression "of facts when he ought to speak, induces "another ignorantly to make a contract ap- "pointing the first his agent to buy and "conferring upon him discretionary power "to purchase his own property, the contract "is voidable and, even if executed, may be "rescinded and the money recovered back on "restoration of what has been received."
>
> "The defendant comes within these prin- "ciples. When he solicited plaintiff's assignors "to become parties to the Syndicate and ap- "point him one of their agents under the cir- "cumstances referred to, he must be held to "have represented that he was legally quali- "fied to discharge the powers which were "being conferred upon him and the obligation "affirmatively rested upon him to inform them

"of his interest in the property which he was "securing authority to buy if he would hold "them to their contract and avoid that impu- "tation of legal misconduct which the law "fastens on an agent who attempts to serve "the interests of both the principal and him- "self."

"He did not occupy the position of an or- "dinary vendor, but he was inviting others "to confer upon him a fiduciary relationship. "If he knew and they were ignorant of the "same fact which attacked the very sub- "stance of that relationship and legally de- "stroyed his ability to meet its full require- "ments, it was his duty to advise them of it "and for his failure so to do they were en- "titled to repudiate the agreement and avoid "what had been done under it."

V.—There is no pretense that Edenborn ever informed the plaintiff or his assignors of the following facts:

1. That he owned a controlling interest in the United States Iron Company which he intended to sell to the syndicate (p. 117, fol. 349).

2. That he did not intend to pay his subscription of $500,000 "in dollars," as called for by the syndicate agreement, but largely by the transfer of his stock interest in said company.

VI.—If Edenborn had intended to inform the plaintiff and his assignors that he owned the controlling interest in the United States Iron Company how simple it would have been for him to have stated this fact in the syndicate agreement, and if he did not intend to pay his subscription "in dollars" but in stock in the United States Iron Company how important it was that Edenborn should have disclosed this fact. It would have made the greatest possible difference to the plaintiff and his assignors

if they had known that Edenborn only intended to turn in stock while they were paying actual cash. This concealment was fraud.

Tyler v. *Savage*, 143 U. S., 79, at p. 98.

VII.—The Referee, in his opinion, says:

> "Each of the subscribers who were repre-
> "sented in this action have testified that they
> "knew nothing of the ownership by the de-
> "fendant of the capital stock of the United
> "States Iron Company. On the contrary
> "they testified that they had no information
> "at the time of making the subscription that
> "the defendant was the owner of stock in
> "the United States Iron Company and did not
> "learn of such fact until the Heckscher
> "action was tried. This testimony is prac-
> "tically uncontradicted and must be taken as
> "true in every substantial aspect. The defend-
> "ant does not claim that he, at any time
> "made disclosure to any of the subscribers to
> "the syndicate agreement of his ownership
> "of the shares in the United States Iron
> "Company."

VIII.—Edenborn obtained the money from Sim and his assignors by false pretense:

1. That nothing existed to disqualify him from acting as their agent in purchasing with their money the property named in the paper.

2. That he was qualified to act impartially and unselfishly, and in their own interest alone.

3. That he had no interest that was hostile to theirs.

4. That he was subscribing $500,000 *"in dollars;"* that is to say, in cash, whereas at no time did defendant intend to pay his subscription to said Syndicate except by putting in his stock in the United States Iron Co., and whatever cash was needed in addition to make the full amount of his

subscription, and that in part payment of his subscription, said defendant transferred his said 5,365 shares of stock in said United States Iron Company to said Syndicate at $70.00 per share.

5. He obtained their money by suppressing the fact that he was obtaining an appointment from them to act for them in a transaction in which he, as their agent, would deal with himself.

IX.—Plaintiff and his assignors had implicit faith in Edenborn. They blindly trusted him. Their signatures to the paper making Edenborn their agent and attorney, agreeing to entrust their money to him, were obtained by false pretenses. The agreement had its origin in fraud. It declares at the outset that "whereas an opportunity is afforded for acquiring the stock of the United States Iron Company at par", etc., its main purpose and object was to avail itself of this opportunity. Behind the syndicate agreement we discover respondent as the dominant and chiefly interested figure. When he had himself appointed agent and attorney of the subscribers to the agreement to purchase the stock of the United States Iron Company at par, his first step in committing the fraud was to conceal the fact that he was having himself appointed agent and attorney to buy from himself his own property.

X.—The paper making him their agent, and everything that was done thereafter rested on a false foundation, to wit: Edenborn's ability in each and every instance, not only in one transaction but in every transaction, to act for them as their faithful agent and trustee in purchasing property with their money.

XI.—Sim and his assignors entrusted their money to Edenborn to invest for them because they

had signed the paper constituting him their agent upon his representation that he had subscribed $500,000 payable in dollars. If he had not succeeded in inducing them to sign the paper constituting him their agent, and relying on his subscription, they would not have entrusted their money to him. Everything that was done, was done because Edenborn had induced them or allowed them to appoint him their agent, without disclosing his adverse interest in the transaction, and that he did not intend to pay his subscription in cash but largely in stock. It was all a part of the transaction constituting Edenborn the agent of each of them.

XII.—The paper contemplated that the "Syndicate Managers" should, if they deemed proper, buy coal lands, coke ovens and blast furnaces, to be used in connection with the United States Iron Company property, which was an iron property. The United States Iron Company was the basic property of the entire enterprise. They were to buy coal lands, coke ovens and blast furnaces to round out the situation. If Edenborn's own property had not gone in there would have been no occasion to buy the other property, which was merely the fringe on the garment.

XIII.—The courts, in the cases to which we shall refer, have said that the conduct of an agent in acting for himself and his principal in the same transaction "is poisonous in its consequences," and that the transaction itself "is to be destroyed in every instance."

XIV.—We respectfully commend to the consideration of the Court as confirming the above quotation of the case of *Heckscher* v. *Edenborn* (203 N. Y., 210), the language of Mr. Justice Lurton in

United States v. *Carter* (217 U. S., 286, at the foot of page 305, and at pp. 306-9), and the following cases:

Michoud v. *Girod* (4 How., 593).
In re Frazin and Oppenheim (181 Fed., 307, at p. 309).
Brookes v. *Martin* (2 Wall, 70).
Wadsworth v. *Adams* (138 U. S., 380, at p. 388).
Glover v. *Ames* (8 Fed., 351).
Crystie v. *Foster* (61 Fed., 551).
McKenly v. *Williams* (74 Fed., 94).
Alger v. *Anderson* (78 Fed., 729).
Mastin v. *Noble* (157 Fed., 506).
Byrne v. *Jones* (159 Fed., 321).

XV.—Plaintiff and his assignors owed no duty to investigate to ascertain whether defendant was committing fraud. They were not dealing at arm's-length. Defendant occupied a relation of trust and confidence. There was nothing to arouse suspicion. As attorney and agent of plaintiff and his assignors he took advantage of his position to commit the fraud complained of. Under these circumstances plaintiff and his assignors owed no duty to investigate.

20 *Cyclopedia of Law*, 60.
Baker v. *Lever*, 67 N. Y., 304.
Directors v. *Kisch*, L. R., 2 H. L., 99.
Enderly v. *Johns*, 120 Ill., 469.
Cleveland v. *Richardson*, 132 U. S., 318 (which notes the distinction where there is a relation of trust and confidence).
Shappiro v. *Goldberg*, 192 U. S., 232.

XVI.—The Referee, it is true, acquits defendant of any intent to deceive and defraud, and he did so evidently because the motive or intent is wholly immaterial.

In the *Heckscher* case (203 N. Y., 210, at p. 19) it is said:

> *"I do not find any evidence that the defend-*
> *"ant was guilty of that active fraud* disclosed
> "in many cases where consciousless promoters
> "have accumulated property at a low price
> "under a well devised scheme to unload it
> "upon others at a high price. There is noth-
> "ing to indicate that the defendant acquired
> "his stock in the United States Iron Company
> "for any such purpose or that the stock pur-
> "chased by him and his associate managers in
> "that Company was not fairly worth the price
> "paid for it which was 30.00. per share less
> "than the price fixed in the Syndicate agree-
> "ment. But broadly speaking the plaintiffs
> "must rest their claim to relief on the basic
> "principle that defendant induced them ig-
> "norantly to execute an agreement which vio-
> "lated the rule that an agent to buy may not
> "purchase of himself."

XVII.—It is the universal rule not only that the agent must make a full and fair disclosure of all the facts and circumstances within his knowledge in any way calculated to enable the principal to judge of the propriety of the same, but when it is questioned by the principal, the burden is upon the agent of proving affirmatively that he dealt fairly, and in the strictest good faith imparted to his principal all the information possessed by him concerning the property.

> *Am. and Eng. Ency. Title Agency,* Vol. 1, p. 1081.
>
> *Cyc. of Law, Title Principal and Agent,* Vol. 31, pp. 1431-1440.

XVIII.—Therefore it is entirely immaterial whether or not the defendant *intentionally* concealed his interest in the United States Iron Company or his ownership of its stock from the plaintiff or his assignors or any other facts. If the de-

fendant refers to the findings of the Referee on this subject embodied in his requests to find we reply that he may not have *intended* to conceal but the fact is that he *did* conceal. It might just as well have been found he intended to disclose but did not disclose. If it was his duty, as he admits it was, to disclose, it is no answer to his failure to disclose that he intended to disclose but unintentionally did not do it, or that he did not intend to conceal but unintentionally did conceal.

> "In *Heckscher* v. *Edenborn* the Court say: "the conclusion has been reached that so far "as it authorized the purchase of defendant's "property, it was constructively fraudulent *"even though there were no actual fraudulent "motive on his part"* (Britton *v.* Ferris, 171 N. Y., 235).

XIX.—In connection with *National Bank* vs. *Petrie* (189 U. S., 423), was decided the case of *National Bank* vs. *Carr* (189 U. S., 426), an action on a rescission of a transaction in which bonds belonging to the bank were sold and delivered to the plaintiff below. The cases were on writs of error to the Court of Appeals and to the Supreme Court of the State of New York. The judgments below were affirmed.

Mr. Justice Holmes said:

> "This case is similar in substance pleading "and argument to the foregoing with the "additional fact that the president of the "bank acted as the confidential adviser of the "defendant in error, and did not reveal to her "that the bonds belonged to the bank or that "he was on both sides of the transaction in- "terested against her. As soon as she found "out that the bank was the seller she re- "pudiated the sale." Judgment affirmed.

The Court of Appeals said in the same case (*Carr* v. *National Bank*, 167 N. Y., 375):

> "The appellant argues that the facts did not "establish any actual fraud on the part of the "defendant, but that was not essential to the "granting of the relief which plaintiff de- "manded. There was shown to have been such "a condition of things in the situation of the "parties and the ignorance in which the plain- "tiff was kept of material facts by ways of sup- "pression or of misrepresentation as in equity "to warrant her in wholly repudiating the "transaction. *It is quite immaterial that "there may have been no intention to actually "defraud* (Hammond *v.* Pennock, 61 N. Y., "145)."

XX.—The following is from the opinion in *Robertson* vs. *Chapman* (152 U. S., 673, at p. 681), which involved a transaction where it was claimed that an agent to sell effected a sale to himself.

> "The law will not in such a case impose "upon the principal the burden of proving "that he was in fact injured, *and will only "inquire whether the agent has been unfaith- "ful in the discharge of his duty.* While his "agency continues he must act in the matter "of such agency solely with reference to the "interests of his principal. The law will not "permit him without the knowledge or assent "of his principal to occupy a position in which "he will be tempted not to do the best he may "for the principal."
>
> *Mastin* v. *Noble*, 157 Fed., 506, 509.
>
> *Marye* v. *Strouse*, 5 Fed., 483.
>
> *Conkey* v. *Bond*, 36 N. Y., 427.

XXI.—It follows, therefore, that where one has himself appointed agent to purchase certain property if he sees fit, without disclosing that it is his own property that he is having himself appointed agent to purchase, the appointment, and, in fact, the entire transaction, must be declared by the

courts to be void *ab initio* at the instance of the principal, irrespective of fraudulent intent.

Pence vs. *Langdon*, 99 U. S., 578.
Downey vs. *Finucane*, 205 N. Y., 250.
Mack vs. *Latta*, 178 N. Y., 525 (which holds that a recovery may be had of a defendant although he received no benefit from the transaction).
Morgan vs. *Skiddy*, 62 N. Y., 319.
Directors vs. *Kisch*, L. R., 2 H. L., 113.
Hornblower vs. *Crandall*, 7 Mo. App., 220. Aff. 72 Mo., 581.
Franey vs. *Warner*, 96 Wis., 222.
Hebgen vs. *Koeffler*, 97 Wis., 313.

THIRD: THE CIRCUIT COURT OF APPEALS ERRED IN HOLDING CONTRARY TO HECKSHER V. EDENBORN THAT THE COMPLAINT DID NOT STATE A CAUSE OF ACTION BECAUSE ON THE FACTS SET FORTH THEREIN DEFENDANT WAS NOT PLACED IN STATU QUO.

Specifications of Errors Nos. 4, 5 and 6.

I.—The point on which the Circuit Court of Appeals decided the case—that upon the facts stated in the complaint the defendant was not and could not be placed *in statu quo*—was not raised on the trial or assigned as error in the Circuit Court of Appeals. If the record is examined it will be clear that until the submission of defendant's brief on the Writ of Error to the Circuit Court of Appeals, the point was not raised. It is not referred to in the Demurrer (p. 25), or the Answer (p. 79, fol. 237), or the Motions to Dismiss (pp. 292, 511),—nor is it assigned to error

II.—The judgment of the District Court on the Demurrer expressly decided that the "complaint states a cause of action at common law based on the rescission of a contract alleged to have been

procured by fraud" (p. 59, fol. 177). No attempt was made by defendant to obtain a review of this decision, and no motion was made in arrest of judgment.

III.—The Referee's opinion deals with this subject and followed, as was his duty to do, the decision of the Court of Appeals in *Hecksher* v. *Edenborn*. He says:

> "In that case the Court of Appeals had be-
> "fore it for decision the sufficiency of a com-
> "plaint which was in all respects similar to the
> "complaint in the present action. It reached a
> "conclusion, reversing the judgment of the Ap-
> "pellate Division, that the complaint stated a
> "good cause of action based upon a proper
> "rescission and held that moneys paid upon
> "the contract which had been induced by
> "fraud, whether actual or constructive, could
> "be recovered back."

IV.—The New York Court of Appeals says of the cause of action set forth in the complaint in the Hecksher case which was similar to this:

> "This action is not one for damages or one
> "to secure the rescission of a contract, but is
> "one based on a prior rescission. In each
> "cause of action plaintiff alleges in substance
> "that he or his assignors, as the case might
> "be, after learning of the interest of respond-
> "ent in the properties to be purchased 'and
> "the falsity of his representations hereinbe-
> "fore set forth,' tendered back to him all of
> "the stock, received under said syndicate
> "agreement, on account of his payment of
> "the amount subscribed,' and demanded of
> "said Edenborn the return to him of said
> "sum * * * so paid by him as aforesaid.
> "Said complaint also in like manner alleges
> "that the plaintiff and his respective assign-
> "ors have respectively 'rescinded said Syndi-
> "cate agreement and his subscription thereto,
> "and is entitled to receive from said defend-
> "ant said sum' subscribed and paid as afore-

"said, and in conclusion the complaint de-
"mands judgment for the aggregate amount of
"the sums paid in by said parties. * * *

"The jury were entitled to find, amongst
"other facts, that the defendant was the
"chief promoter and organizer of an enter-
"prise which, however reputable and legiti-
"mate, contemplated as its very basis the
"purchase of a million dollars par value of
"the stock of a certain corporation of which
"he was the majority owner; that the syndi-
"cate agreement made defendant and his
"two associate managers agents of the
"various subscribers and gave them discre-
"tionary power to purchase the stock; that
"defendant, who had held rather intimate and
"influential relations with some at least of
"plaintiff's assignors, in effect invited or so-
"licited them to become parties to the project
"and subscribers to the agreement; that at the
"time they were ignorant of his interest in the
"property to be acquired, and that he did not
"inform them of such interest, but on the con-
"trary his apparent subscription of $500,000
"on the paper showed to them, and various
"statements which he made, as that he was
" 'putting in cash the same as' one of the sub-
"scribers and that 'any man in joining (the
"syndicate) puts in a dollar against the other
"man's dollar,' and that there was no 'inside
"profits,' at least tended to exclude the idea
"that defendant was the owner of a large
"amount of property to be acquired and which
"would in effect offset or pay his large sub-
"scription, when as a matter of fact he always
"intended to transfer his stock to the syndicate
"as he did. It seems to me that if these facts
"should be found a court would be entitled to
"find fraud as a matter of fact for which the
"agreement could be rescinded and moneys
"paid thereunder recovered back."

V.—The complaint herein after alleging in paragraph "First" (pp. 34 and 35, fols. 102-105) that defendant promoted, formed and carried out the syndicate agreement and "personally controlled

and managed the promotion and operation of the syndicate and the moneys subscribed thereto," and in paragraph "Second" (p. 45, fols. 105-106) the relation of trust and confidence which defendant occupied toward the subscribers, and in paragraphs "Third" and "Fourth" (pp. 36-37, fols. 107-110) the representations and statements made by defendant; his concealment of his majority ownership of the capital stock of the United States Iron Company; that he was buying from himself individually and selling to himself as agent and attorney for the subscribers his own property and that his subscription of $500,000. payable in dollars, he did not intend to pay in dollars, but in stock of the United States Iron Company, and in paragraph "Sixth" (p. 38, fol. 114) the making of the subscriptions relying on a full disclosure by defendant, alleges upon the subject of recission as follows (p. 40, fol. 119):

> "EIGHTH: That the plaintiff as soon as pos-
> "sible after the discovery by him of fraud and
> "deceit and fraudulent concealment on the
> "part of the defendant practised on him as
> "aforesaid, notified said syndicate managers,
> "including defendant, that he elected to re-
> "scind his subscription to said syndicate
> "agreement and offered to return to defend-
> "ant all that he had received from him to wit;
> "the said certificates of stock and demanded
> "payment of the amount so as aforesaid paid
> "by him to defendant, which said offer and de-
> "mand were refused, and that he ever since has
> "been and now is ready and willing to deliver
> "up said certificates of stock upon receiving
> "payment of the amount paid by him as afore-
> "said."

VI.—The tender was made to the defendant for several good and sufficient reasons. 1, He was a syndicate manager and the tender to him was on behalf of the syndicate; 2, He was the wrongdoer from whom we seek relief; 3, He was the agent and

attorney of the syndicate subscribers who committed the fraud complained of; 4, It was he who delivered the stock, and it should be restored to him. 5, No question was made on the trial, nor is any raised by the Assignments of Errors as to the propriety and sufficiency of the tender to defendant. If the "narrative of proceedings" is examined, to ascertain what defendant conceded, it will be seen that the defendant conceded the propriety and sufficiency of the tender to defendant. The concessions appear on pages 201, 277, and the demands, as made, appear in Exhibits 71, 75, on pages 672, 674. Upon the evidence presented the Referee found as a fact (Record, p. 118) that a good and sufficient tender had been made.

VII.—It is apparent that defendant was put *in statu quo* when we consider what the *status quo* was. The complaint states the following facts: Defendant owned more than one-half of the United States Iron Company (p. 6, fol. 17). He, with Elwood and the Williams estate, owned within a few shares of the entire capital stock. The Company had proved unprofitable (p. 6, fol. 18). To put it on its feet, and extricate themselves, defendant conceived the scheme or plan embodied in the syndicate agreement (pp. 4-5, fols. 12-13). That agreement expressed at the outset that "an opportunity is afforded to acquire for a cash consideration the ownership, control and possession of the United States Iron Company of New Jersey, at par, said company being capitalied at $1,000,000." (p. 6, fol. 10; p. 100, fol. 302). This was for the benefit of Edenborn, who owned 5,365 out of 9,250 shares (p. 6, fols. 16-18). He must have believed that he would be benefited, otherwise he would not have prepared it, nor obtained subscriptions to it.

VIII.—Concealing the fact that he owned a majority of the stock of the United States Company,

and that he intended to transfer it to the syndicate in payment of his subscription which was payable "in dollars", he by false representations and statements induced plaintiff and his assignors, toward whom he occupied a relation of trust and confidence, to become subscribers (p. 5, fol. 15; p. 6, fol. 18) and thereby to appoint him their agent and attorney to purchase from himself his own property concealing the fact of his ownership.

IX.—The agreement was between the syndicate managers, of whom defendant was one, as parties of the first part, and the subscribers thereto *severally* (see Agreement, p. 101, fols. 301-2). There is nothing in the agreement which makes the subscriptions dependent upon each other, or creates an agreement by the subscribers between themselves, or prevents any subscriber from rescinding or cancelling his subscription.

X.—Suppose, at this point, before plaintiff and his assignors had paid their subscriptions, they had discovered the fraud practised by defendant, can there be any doubt they could have compelled a cancellation of their subscriptions on the ground of fraud? Or, in an action to compel payment of their subscriptions, that they would have had a complete defense on the same ground?

XI.—Subsequent facts show that when defendant, in payment of his subscription, surrendered his shares of stock in the United States Iron Company, at 70, to the Sheffield Coal & Iron Co. (which was nothing but the United States Iron Company with its name changed), with enough cash to make up his subscription, he did nothing, in fact, but put into the same old company, with its name changed, the difference between his 5,365 shares of stock of the United States Iron Company, at 70, and his sub-

scription of $500,000 (p. 8, fol. 24). But plaintiffs paid their subscriptions to defendant in cash and received from him certificates of stock in the Sheffield Coal & Iron Company (p. 9, fol. 26) representing, of course, their entire interest in all the property of that company, part of which was the amount of the cash difference paid in by defendant.

XII.—When, therefore, plaintiff and his assignors tendered to defendant their stock in the Sheffield Coal & Iron Co. received from him, they restored to him every interest which they had acquired in the Sheffield Coal & Iron Co. under the syndicate agreement, including their interest in defendant's cash payment.

XIII.—Defendant claims that in carrying out the Syndicate Agreement he put the cash subscriptions into properties which were conveyed to the Sheffield Coal and Iron Company and insists that plaintiff on rescission should have tendered such properties to him—in other words, that plaintiff must undo everything done under the Syndicate Agreement—notwithstanding that Edenborn did what he claims he did in carrying out his own fraudulent enterprise. He cannot take advantage of a situation created by himself in working out his own fraud. The law only requires the injured party to restore what he received. All that plaintiff and his assignors received from Edenborn for the money they entrusted to him was Sheffield Company stock, and this was tendered. This tender put him *in statu quo* as between himself and the subscribers whom he defrauded.

XIV.—The Circuit Court of Appeals in discussing the subject inquires:

> "How could an individual subscriber by "tendering the defendant his stock in the re-"organized Company representing a propor-"tionate interest in other properties greatly

"exceeding in value the amount of the "defendant's interest in the original capital "of the United States Iron Company and de- "manding back his whole subscription restore "the defendant to his original position?"

XV.—Our answer is, the plaintiff and his assignors were under no obligation to defendant except to restore the *status quo* "as far as possible". This they did when they tendered their stock representing their entire interest in and under the Syndicate Agreement. They could do no more. Defendant's fraud not only rendered it unnecessary, but absolutely prevented it. Defendant, being one of the syndicate managers, and majority owner of the stock of the United States Iron Company was in complete control of the company and of the syndicate. He had the largest individual interest and was the moving spirit. He owned over one-half of the United States Iron Company and one-fifth of the Sheffield Coal & Iron Company. The syndicate was managed and controlled by him. He received the subscriptions. He conducted the operations of the syndicate. Nothing could be done without his consent. Plaintiff and his assignors had no voice or control in the matter. So far as the management of the syndicate and control of the Sheffield Coal & Iron Company are concerned, defendant was dominant, and plaintiff and his assignors were powerless. The only thing they controlled in the whole matter was their stock in the Sheffield Coal & Iron Company; this they tendered to defendant.

XVI.—The opinion in *Hecksher* vs. *Edenborn* which received the concurrence of the entire Court of Appeals of New York contains a full discussion of this subject (203 N. Y., pp. 227-30).

XVII.—The defendant entirely misconceives the reason why the law insists upon restoring the

status quo. There is nothing technical about it. It is plain, common honesty and common sense that as long as we ask defendant to pay back all the money he got from us we should be willing to restore him everything we got from him in the transaction. The object of the law requiring a tender is to obviate the necessity of defendant when he has been defeated, suing plaintiff for what he got in the transaction. When the plaintiff tendered the defendant everything he got, that is all that can be asked.

XVIII.—In the Court below counsel for the defendant dwelt upon the hardship to defendant on being compelled to practically buy back plaintiff's stock by paying back the amount paid as subscription, arguing at length as to the consequences that might follow. In *Masson* vs. *Bovet* (1 Denio, 69), the leading case upon this subject, the Court uses some very pertinent language concerning restoring what has been received:

> "This is not exacted, it is said, 'on account "of any feeling of partiality or regard for the "fraudulent party. The law cares very little "what his loss may be and exacts nothing for "his sake. If therefore he has so entangled "himself in the meshes of his own knavish plot "that the party defrauded cannot unloose him, "the fault is his own and the law only requires "the injured party to restore what he has re-"ceived and as far as he can undo what has "been done in the execution of the contract. "This is all that the party defrauded can do, "and all that honesty and fair dealing require "of him. "If these fail to extricate the wrong-"doer from the position he has assumed in the "execution of the contract, it is in no sense "the fault of his intended victim, and upon the "principles of eternal justice, whatever conse-"quences may follow they should rest upon the "head of the offender alone."

FOURTH: HECKSCHER *v.* EDENBORN, 203 N. Y., 210, CORRECTLY DECIDED THAT THE DEFENDANT WAS GUILTY OF CONSTRUCTIVE FRAUD; THAT PLAINTIFF DID AS FAR AS POSSIBLE PUT HIM IN *statu quo* AND THAT IF THERE WAS NOT COMPLETE RESTORATION DEFENDANT'S OWN FRAUD PREVENTED IT, AND HE SHOULD BEAR THE CONSEQUENCES.

Specification No. 3.

I.—The Referee finds (p. 116, fol. 347), that in "1902 *the defendant* in connection with others *conceived a scheme* to consolidate the United States Iron Company and other iron ore properties and erect blast furnaces for smelting iron ore and manufacturing pig iron. Pursuant to such scheme and on or about April 5th, 1902, the *defendant prepared an agreement* dated on that day, which set out the terms of the proposed consolidation, and the defendant invited subscriptions to the capital stock of the proposed new corporation to be formed". He also finds (p. 748, fols. 22, 44) *"thereupon defendant undertook to promote, form and carry out said syndicate and direct and manage the same and act thereunder as the promoter thereof, and the agent and attorney of the several subscribers and each of them* thereto" * * * (p. 749, fol. 2245). These findings accord with the allegations of the complaint on that subject (pp. 34-5, fols. 102-5). It was defendant's scheme, conceived and carried out by him as promoter and syndicate manager, as well as agent and attorney of the subscribers, and it follows he was responsible for the steps taken to consummate the scheme he had conceived, and embodied in the syndicate agreement, and is in no position to urge that because of them he was not put *in statu quo.*

II.—He undoubtedly knew and realized it was complicated; that, as its author, he was responsi-

ble for it, and for its legal consequences, if there was fraud, intentional or unintentional, actual or constructive.

Dickerman v. *Northern Trust Co.*, 176 U. S., 181.

III.—With respect to the decision in *Getty* vs. *Devlin* (54 N. Y., 20), that case is dealt with and distinguished by Judge Hiscock in his opinion in *Heckscher* vs. *Edenborn*, and its inapplicability pointed out.

IV.—The origin of the scheme being fraudulent, it is of no consequence what was done subsequently, the material fact being that the fraud was consummated. Although it seems scarcely possible that at the outset his co-syndicate managers did not know respondent's purpose, the time came when they did know. At all times they owed a duty to the syndicate subscribers, for whom they were acting as agents, and when it came to their knowledge that he was engaged in selling to the syndicate his own property, it was their duty, under penalty of participating in his fraud, to repudiate the transaction. Not having repudiated it, they became equally guilty with him. They lent themselves to respondent's fraudulent scheme. Neither of them was called as a witness; neither offered an explanation; it was the respondent's duty to call them if they could exonerate him and themselves, and every presumption is that they could not, and that their testimony, if it had been forthcoming would have been adverse.

V.—The New York Court of Appeals points out that if any complications or difficulties arose in the way of offering complete restoration of the *status quo* it was due to a situation brought about by Edenborn's fraud in preparing and promoting a syndicate agreement authorizing him to purchase

from himself his own property, and if, upon rescission for his fraud he could not be placed completely *in statu quo,* plaintiff having done everything in his power to do so, the consequences must fall on defendant. The Court says; (p. 227).

> "The only benefit which the defendant "would secure from the agreement thus re- "scinded would be that before recovery of the "moneys paid to him he should be restored to "his original condition as against the acts "which he had performed under the agreement "before rescission. Even this general rule is "not enforced with unvarying strictness, and "among the exceptions to it is a case where "the wrongdoer has so complicated matters as "between him and the party seeking relief that "complete restoration is impossible."

VI.—In thus deciding, the Court followed repeated adjudications in the courts of the State of New York.

Masson vs. *Bovet* (1 Denio, 69).
Hammond vs. *Pennock* (61 N. Y., 145).
Guckenheimer vs. *Angevine* (81 N. Y., 394, at p. 397).
Butler vs. *Prentiss* 158 N. Y., 49).
Moore vs. *Mutual Reserve Fund* (121 App. Div. N. Y., 335).

VII.—The principles of these decisions have received the approval and endorsement of this Court, as well as the courts of several States.

Veazie vs. *Williams* (8 Howard, 134-158).
Neblet vs. *Macfarland* (92 U. S., 101, at p. 105).
Commonwealth vs. *American* (197 F. R., 780, 791).
Perry vs. *Arle* (143 Mass., 540).
O'Shea vs. *Vaughn* (201 Mass., 412).
Paquin vs. *Milliken* (163 Mo., 79).

St. John vs. *Munger* (29 L. R. A., 63).
Van Dyke vs. *Walters* (88 Ill., 444).
Felt vs. *Bell* (205 Ill., 213).
Gatling vs. *Newall* (9 Ind., 572).
Coleson vs. *Smith* (9 Ind., 9).
Downer v. *Smith* (32 Vt., 1).

Kerr on Fraud (at p. 369) says:

"Nor is the inability of a man to rescind a "transaction, as a whole, fatal to his right of "rescission, if his inability to do so is atrrib- "utable to the party against whom he seeks "relief. If the latter has entangled and com- "plicated the transaction in such a manner as "to render it impossible that he should be re- "stored, the party defraudded may, on doing "whatever it is in his power to do, have the "transaction rescinded."

Am. & Eng. Ency., Vol. 24, p. 623.

VIII.—The Circuit Court of Appeals does not notice these decisions and treats the wrongdoer, as to placing him *in statu quo,* as equally innocent with the defrauded party, notwithstanding that complications created by the wrongdoer make complete restoration of the *status quo* impossible. It makes a way of escape for the wrongdoer, by holding that the right to rescind and recover back what is paid is lost, if the wrongdoer can originate an agreement so complicated that, after it is executed, the innocent party cannot put the wrongdoer *in statu quo.* It reverses the long established rule that the wrongdoer who has complicated the transaction must suffer rather than the innocent party, and visits the consequences of the wrong on the innocent rather than on the guilty. Inability to put the wrongdoer completely *in statu quo* may in some instances work a result not perfectly equitable, so far as the wrongdoer is concerned, but the Court of Appeals of New York, following the long-established rule, held that the consequences which follow the fraud should be borne by the one who perpetrated

it, and created the complications which brought about the result. In *Neblet* vs. *Macfarland* (92 U. S., p. 101), this Court held where a similar question was raised that:

> "Parties engaged in a fraudulent attempt "to obtain a neighbor's property are not the "objects of the special solicitude of the "Courts. If they are caught in their own "toils, and are themselves the sufferers, it is "a legitimate consequence of their violation "of the rules of law and morality. Those who "violate these laws must suffer the penalty."

IX.—The decision of the United States Circuit Court of Appeals that it was necessary to a rescission that the defendant, who had himself fraudulently devised and executed a complicated scheme, must be placed *in statu quo,* notwithstanding that he, the wrongdoer, was responsible for the complications preventing it, not only destroys a long-established and salutary rule, but promulgates a new rule, viz., "because of the peculiar situation of the case, no right of rescission exists in favor of one who has been led by fraud into a complicated agreement, which has been fully executed." If the difficulty referred to by the Circuit Court of Appeals in restoring the *status quo* really exists, it is a result of the scheme devised and promoted by defendant for which he is responsible, and the consequences of which he should bear, and not plaintiff and his assignors, who are innocent parties.

FIFTH: THE CIRCUIT COURT OF APPEALS ERRONEOUSLY HELD, AS THE TURNING POINT OF THE CASE, THAT THE TRANSACTION WAS SUCH THAT THE PLAINTIFF COULD NOT PUT DEFENDANT IN STATU QUO, AND THAT IF THERE WAS ANY RIGHT OF RESCISSION IT MUST BE WORKED OUT THROUGH THE COMPANY.

Specification of Errors No. 9.

I.—The Circuit Court of Appeals reached this result by rejecting the decision of the New York

Court of Appeals, and following the decision of an inferior appellate tribunal and approving a minority opinion therein, both of which had been overruled on appeal to the New York Court of Appeals. The language of the Court is:

> "If the syndicate subscribers have any right "of rescission that right must be worked out "through the purchasing company. Moreover "we do not see how even it upon rescission "could restore the defendant to its original "position. It may well happen that because "of the peculiar position of any particular case "no right of rescission exists in favor of one "who has been led by fraud into a complicated "agreement which has been fully executed. We "think this such a case. On the other hand "any profit made by the defendant or any dam- "age sustained by the purchasing company as "a result of this particular fraud, may be re- "covered by it."

II.—Whenever there is the slightest pretext to do so, the point is always raised by the doer of the fraud that the defrauded party has no individual right to enforce, and that whatever right there is must be enforced through the medium of the corporation. Whether rights of subscribers or shareholders must be enforced through the corporation depends on whether the injury is one which affects the *corporate property;* in which case the corporation would be the proper complainant. If, however, it affects the personal rights of individual subscribers, or shareholders, they are entitled to sue individually.

Dewing vs. *Perdicaries* (96 U. S., 193, at p. 196).

Hanchett vs. *Blair* (100 Fed., 817, at p. 824).

Morawetz on Corporations (Secs. 236*a*, 237, 292, 565-7).

Old Dominion Co. vs. *Lewisohn,* 210 U. S., 216.

Davis vs. *Las Ovas Co.*, 227 U. S., 80.
Yeiser vs. *U. S. Paper Co.*, 107 Fed., 340.
Blum vs. *Whitney*, 185 N. Y., 232.

III.—Here there is no question of injury to *corporate property* at all. The wrong was not done to the Sheffield Coal and Iron Co. but the syndicate subscribers, who subscribed in ignorance of the fact that Edenborn was majority owner of and controlled the United States Iron Company, was purchaser as well as seller, and did not intend to pay his subscription in cash but in stock. The United States Iron Co., in which defendant was the majority owner, and the purchase of which was the chief object of the syndicate agreement, never went out of existence, but, as the complaint alleges (p. 40, fol. 113) there was a mere change of name from United States Iron Company to Sheffield Coal & Iron Company, with the stock increased from $1,000,000. to $2,500,000. Defendant's fraud worked a substantial advantage, rather than an injury, to the company, by putting into its treasury the syndicate subscriptions.

IV.—The fraud was not on the corporation, affecting the corporate property, nor on the syndicate subscribers collectively, but was a direct personal wrong on those individual subscribers who made and paid their subscriptions in ignorance of defendant's controlling interest in the United States Iron Company, and of his plan to sell his own property to the syndicate, and pay his subscription, payable in dollars, by transferring to the syndicate his stock in the United States Iron Company.

V.—The principal beneficiary of this transaction was defendant. He owned more than five-ninths of the capital stock of the United States Iron Company, and conceived, prepared, promoted

and carried through the scheme to induce subscriptions to be used to resuscitate, for his benefit, the United States Iron Company, with the result, as the complaint alleges (p. 40, fol. 120) that the Sheffield Coal & Iron Company became insolvent, went into the hands of a receiver, and the stock issued to plaintiffs and their assignors in payment of their subscriptions became worthless.

VI.—The question does not depend upon whether the subscribers are many or few, or whether all of them have been defrauded or not, nor does it depend upon the extent of the fraud perpetrated—whether great or small. The suggestion in the opinion of the Court that "the result of the decision in the New York Court of Appeals would make a manager in a case like this who had sold his own property to a syndicate for $1,000. without disclosing his personal interest, liable for the loss resulting from failure of the entire operation—perhaps $2,500,000." is specious, but not sound. In the first place, we have no such case but, rather, a case where defendant's subscription amounted to one-fifth and, adding to it the stock interest of Elwood and the Williams estate, approaches one-half of the entire amount subscribed. In the second place, if the amount of property transferred by a syndicate manager was infinitesimal compared with the total amount subscribed, it might be proper to take into consideration whether the amount transferred was not so trifling that the subscriber could not have been influenced by the fact, but, in any case, a syndicate manager who takes advantage of his position to dispose of his own property to the syndicate, concealing the fact, is plainly guilty of fraud; and be the property large or small there will be danger in relaxing the rule to any extent. Where shall the line be drawn? But, it is not necessary to consider

these matters, because defendant's fraud in concealing his ownership in and control of the United States Iron Company, and the transfer of his own stock in payment of his subscription was so large a proportion of the enterprise—one-fifth of the whole $2,500,000.—that good faith demanded full and fair disclosure of the facts. Concealment worked serious injury, it being proved and found that the plaintiff and his associates relied upon that full and fair disclosure by defendant which he admits it was his duty to make, and did not make.

SIXTH: THE FACT THAT THE CONTRACT WAS EXECUTED WAS ERRONEOUSLY RELIED ON BY THE CIRCUIT COURT OF APPEALS TO DEFEAT A RECOVERY.

Specification of Error No. 8.

I.—The cases are too numerous to require citation in which executed contracts for the sale or purchase of property, such as stock interests, merchandise, real estate, etc., have been rescinded on the ground of fraud, and judgment rendered for the moneys paid on return of the consideration received. The case of *Pence* vs. *Langdon* (99 U. S., 578), is an instance of this. Just as in this case, the fraud consisted in one individual taking advantage of his relation to another to sell his own stock in a mine, concealing the fact of his ownership. In that case both of the parties treated the contract as fully executed, and it was not until the vendee of the stock visited the mine at the invitation of the vendor after the stock had been sold and paid for, that the fraud was discovered, whereupon the vendee immediately gave notice of rescission and demanded the return of the amount paid. The case is in many respects similar to ours and is a

direct authority to the effect that where fraud is established, whether in equity for a rescission, or in a common law action founded on prior rescission, the Court will in the one case grant relief, and in the other give judgment for a return of the amount paid.

Carr v. *National Bank & Loan Co.*, 167 N. Y., 375; *aff'd on writ of error*, 189 U. S., 426.

Turner v. *Ward*, 154 U. S., 618.

Burton v. *Driggs*, 20 Wall, 125.

Smith vs. *Richards*, 13 Pet., 26.

Canadian Co. vs. *Assets Co.*, App. D., , N. Y.

II.—In the *Hecksher* case, at page 222, it is said:

> "It must be quite as elementary and true "that if one by misrepresentation or suppres- "sion of facts when he ought to speak, in- "duces another ignorantly to make a con- "tract appointing the first his agent and con- "ferring upon him discretionary power to "purchase his own property, the contract is "voidable and *even if executed* may be re- "scinded and the money recovered back on "restoration of what has been received."

The rule is thus stated in *American and English Encyclopedia of Law*, vol. 24, p. 613:

> "Yet where it clearly appears that the "party against whom rescission is sought "was guilty of fraud, misrepresentation, or "deceit, or of some other wrong of equal "force in vitiating the contract, the circum- "stance that the contract has been fully and "voluntarily performed before discovery of "the facts giving rise to the right of rescis- "sion, will not operate to prevent the court "from granting relief; under such circum- "stances the right to rescind is none the less "available after full performance of the con- "tract than before; provided, of course, that

"the other party seeking relief has not by his "conduct waived the right, that the other party "can be put *in statu quo,* and that no adverse "rghts of third persons have intervened."

Bigelow on Fraud (p. 430) says:

"Indeed the fact that parties cannot be put "precisely *in statu quo* in regard to the sub- "ject-matter of the transaction will not be a "valid ground of objection to rescission. If "it were, *an executed contract could never be "rescinded,* for the parties never could be "placed thus in regard to time or in regard "to the use of the property. Some period of "time must elapse before rescission is pos- "sible, and some use of the property will "generally be necessary to a discovery of the "wrong. All that can be required in a case of "an executed contract is that the injured party "should restore whatever of value has been re- "ceived and *so far as the nature of things will "permit* undo what has been done."

III.—Defendant's answer did not deny the allegation of the complaint which the Referee found as a fact, that it was his duty to make to the subscribers full and complete disclosure of his interest in the United States Iron Company, of his stockholdings therein, and of any other interest which he had in said Company, and in the proposed scheme provided for in the syndicate agreement, and to give to the subscribers, and each of them, as full information as the defendant possessed relating to said subscription, and of any fact which would affect their interest or the interest of any or either of them.

IV.—The complaint alleged, and the Referee has found, that he concealed from plaintiff his ownership of a majority of the stock of the United States Iron Company, and while acting as syndicate manager, and agent and attorney of the syndi-

cate subscribers, was engaged in procuring the sale of his own property from himself to himself as syndicate manager, and that having made a subscription of $500,000. payable in cash to the syndicate, he did not intend to pay in cash, but by his stock in the United States Iron Company, paying only sufficient cash to make up any deficiency.

Tyler vs. *Savage*, 143 U. S., 79, at page 98, says:

> "This suppression of a material fact which "Tyler was bound in good faith to disclose, "was equivalent to a false representation."
>
> *Crosby* vs. *Buchanan*, 23 Wall, 420, at p. 457.
>
> *Cleveland* vs. *Richardson*, 132 U. S., 318.
>
> *Stewart* vs. *Wyoming*, 128 U. S., 383, at p. 388.

V.—These frauds were clearly proved and not denied; plaintiffs were deceived and influenced thereby and they presented a plain case for invoking, if it had been necessary, the power of a Court of equity to cancel an executed contract.

> *Atlantic Delaine Co.* vs. *James*, 94 U. S., 207.
>
> *Union R. Co.* vs. *Dull*, 124 U. S., 173.
>
> *Maxwell Land Grant case*, 121 U. S., 325.

VI.—All the authorities and text books proceed upon the theory that a fully executed contract may be rescinded for fraud, conditioned only upon the fraud being clearly proved, and upon the defrauded party doing everything in his power to put the wrongdoer *in statu quo*. Fraud, when proved, vitiates every transaction, and the remedy by rescission was particularly designed, and is especially appropriate, to annul executed contracts. It may not be possible, notwithstanding fraud is established, to put the wrongdoer completely *in statu quo*, but that this is not a valid objection is well

stated in the passage above quoted from Bigelow on Fraud.

In *Neblett* v. *Macfarland* (92 U. S., 101, at p. 103), this Court said:

> "The Court proceeds on the principle, that, "as the transaction ought never to have taken "place, the parties are to be placed *as far as "possible* in the situation in which they would "have stood if there had never been any such "transaction."

SEVENTH: ATTENTION SHOULD BE CALLED TO THE EXTRAORDINARY CHARACTER OF DEFENDANT'S ASSIGNMENTS OF ERROR.

Specification of Error No. 7.

I.—*They extend from page 787 of the Record to and including page 850, sixty-four pages in all, embracing 224 assignments.* Rule II of the Circuit Court of Appeals requires that the assignments of error "set out separately and particularly each error intended to be urged". This is essential to the allowance of a Writ of Error.

Rowe vs. *Phelps* (152 U. S., 87).

II.—General assignments, such as these, which do not set out "separately and particularly" the error intended to be raised are insufficient. There must be something specific.

Lucas vs. *Brooks* (18 Wall, 436, at p. 456).

Scholey vs. *Rew* (23 Wall, 331, at p. 345).

Van Stone vs. *Stillwell* (142 U. S., 128, at p. 133).

Grand Trunk vs. *Ives* (144 U. S., 408, at p. 418).

III.—These assignments—two hundred and twenty-four in number—were nothing more or less than a perversion of the rule relating thereto.

In *Phillips* vs. *Seymour* (91 U. S., 648), Mr. Justice Miller said:

> "In this Court plaintiff in error by one "counsel files 45 assignments of error and by "another 7 more making 52 in all.
>
> "The object of the rule requiring an assign- "ment of error is to enable the Court and op- "posing counsel to see on what point the "plaintiff's counsel intends to ask a reversal "of the judgment and to limit the discussion "to those points. This practice of unlimited "assignments is a perversion of the rule de- "feating all its purposes, bewildering the "counsel of the other side and leaving the "Court to gather from a brief often as prolix "as the assignments of error, which of the "latter are really relied on."

IV.—It is true that the Court may notice "a plain error not assigned", but we submit that the point upon which the judgment was reversed was far from being a "plain error", and should not have been entertained in the absence of an assignment of error, pointing it out "separately and particularly".

V.—We respectfully call the attention of the Court to two points:

(1) It is not assigned as error that the facts stated in the complaint, nor (2) that the facts found by the Referee, did not support the judgment rendered.

VI.—There are 224 assignments of errors and not one of them assigns error in either of these re-

spects. Inasmuch as respondent was so minute in specifying errors as to specify 224 no special indulgence is called for in his omission to assign the errors upon which he now relies.

VII.—With respect to the first eight assignments of errors (pp. 787-9, fols. 2359-2365) they relate to the sufficiency of the complaint, with the exception of those dealing with an alleged defect of parties and an improper joinder of causes of action. They are of the most general character and specify nothing with particularity. This has been frequently held to be contrary to the office of an assignment of errors and to the rules laid down concerning them. To meet these points respondent's counsel calls attention to certain cases in this Court, but none of them have any bearing, as this question was not raised, while in the case of *Chicago* vs. *Clark* (178 U. S., 353) error was assigned that the findings did not support the judgment. This subject is considered by this Court in *Behn* vs. *Campbell* (205 U. S., 483), from which it appears that while errors not stated in the assignments of errors have sometimes been considered, the limit of this practice is accurately stated in the 35th rule of the Court, and that errors not assigned will be disregarded except that the Court at its own option may notice a plain error not assigned, and that the Court will not be astute in selecting statements of law and subjecting them to minute scrutiny where, on the whole, it is clear that the facts found by the Court justify the judgment which it rendered.

VII.—If the assignment of such a multitude of errors is, as has been said, "a perversion of the rule," we submit that where counsel have taken

pains to search the record for every conceivable error and assign it, the omission to assign with particularity what he claims is the principal error in the case and what he is pleased now to call "plain error not assigned" ought to prevent a consideration of such errors not assigned. The errors not assigned which he would have this Court consider are not, we believe, in any sense "plain errors"; they are, at most, doubtful and questionable errors and, in fact, not errors at all. We think that the Circuit Court of Appeals was not justified, in the absence of proper assignments of errors in the respects referred to, in disposing of the case upon errors not assigned.

Briscoe v. *District of Col.*, 221 U. S. 547.
Pickett v. *U. S.*, 216 U. S. 456.
Foster Fed. Pr., Vol. III, p. 2473.

EIGHTH: THE "NARRATIVE OF PROCEEDINGS BEFORE THE REFEREE" AND THE SUBSEQUENT PROCEEDINGS BEFORE HIM ARE NOT PROPERLY BEFORE THIS COURT.

I.—No bill of exceptions was allowed, but the District Judge allowed them to be filed but not as a bill of exceptions (see pp. 716-854), and the Clerk of the Court included them in the return to the Circuit Court of Appeals. A motion was made before that Court to strike them from the record, but that Court allowed them to remain reserving the question of striking out until the argument (p. 860). When the judgment was reversed the question of striking out was not passed upon. When the writ of certiorari was granted by this Court, the Clerk of the Circuit Court of Appeals certified them as a part of the papers on file in the Circuit Court of Appeals, but they are not, we submit, a part of

the record properly before the Court of Appeals nor entitled to be considered by this Court.

England v. *Gebhardt*, 112 U. S. 502.
Sire v. *Ellithorp*, 137 U. S. 579.
Duncan v. *Atchison*, 72 F. R. 808.

NINTH: THE JUDGMENT OF THE CIRCUIT COURT OF APPEALS SHOULD BE REVERSED, AND THAT OF THE DISTRICT COURT ENTERED UPON THE REPORT OF THE REFEREE SHOULD BE AFFIRMED.

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